

In the Matter of License No. Z-257907 Mitchell, Master's Document No.

Issued to: JOSEPH E. MCGIFFNEY

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

1160

JOSEPH E. MCGIFFNEY

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

By order dated 17 August 1959, an Examiner of the United States Coast Guard at Philadelphia, Pennsylvania revoked Appellant's seaman documents upon concluding that he is physically incompetent to serve as a deck officer under his Master's license. The specification, which was found proved subsequent to a plea of not guilty, alleges that, on 21 May 1956, Appellant was suffering from chronic brain syndrome (a group of concurrent symptoms characterizing a disease) associated with central nervous system syphilis.

Appellant was represented by professional counsel during the course of the hearing and on appeal. The only evidence introduced by the Investigating Officer was a narrative, clinical report from a U. S. Public Health Service Hospital.

Appellant's defense consisted of the testimony of an expert witness, Doctor Philip Q. Roche, a practicing Psychiatrist. The gist of his testimony was that Appellant has syphilis which led to a central nervous system disorder affecting his brain; the syphilis is not now active; Appellant is legally sane; there were not enough tests conducted on Appellant to establish that he is incompetent although the symptoms tend to support the diagnosis of chronic brain syndrome which signifies some damage to the brain and consequent impairment of Appellant's performance ability.

On the basis of the evidence presented at the hearing, the Examiner concluded that the charge and specification had been proved. He then entered an order revoking all documents issued to Appellant.

FINDINGS OF FACT

Appellant is 57 years old. He contracted syphilis in 1928 and has been regularly treated for it. Organic deficiencies have been noted in the past during his numerous hospitalizations. In recent years, Appellant has been serving under the authority of his license as a night watchman on ships.

Between 2 May and 21 May 1956, Appellant was under observation at the U. S. Public Health Service Hospital at Staten Island, New York. Tests conducted made known the following symptoms:

1. Syphilis weakly reactive in the blood.
2. Twitching of facial muscles.
3. Inability to focus both eyes at the same time.
4. Speech and hearing difficulties.
5. Perseveration.
6. Very poor mental retention.
7. Very slow mentally.

Based on these symptoms and Appellant's history of syphilis, his case was diagnosed as "chronic brain syndrome associated with central nervous system syphilis." Appellant was discharged from the hospital as "unfit for sea duty."

#### BASES OF APPEAL

This appeal had been taken from the order imposed by the Examiner. It is contended that the Examiner based his decision on a finding that Appellant's binocular vision was defective rather than on findings as to the allegations in the specification; concluding that the charge and specification were proved, was contrary to the weight of the medical evidence in the record and the statement of Dr. Roche that "there is not enough to establish the fact he has had a complete brain syndrome." The doctor also expressed the opinion that Appellant was competent to perform the duties of a watchman on a ship.

Appellant was denied the right of cross-examination when the hospital record was received in evidence over objection by counsel.

APPEARANCE: Samuel Polsky, Esquire of Philadelphia, Pennsylvania, of Counsel.

#### OPINION

The contentions raised on appeal are considered to be without merit. The Examiner made a specific finding that Appellant was suffering from chronic brain syndrome associated with syphilis, as alleged in the specification. The Examiner then concluded that the charge of physical incompetence was proved. This finding and conclusion are adequately supported by the medical report which contains the facts (symptoms) on which the conclusion (diagnosis) of the evaluating physician at the hospital was based. It is evident from the above symptoms that Appellant's brain was damaged by syphilis to such an extent that several of the symptoms are individually sufficient to disqualify Appellant from serving as a Master or deck officer on a ship. The Examiner simply used one example of this when he referred to Appellant's defective vision. Hence, the facts that it was not established that Appellant was suffering from a "complete" brain syndrome and that he might be competent as a watchman are not relevant with respect to the proof of the charge and specification.

The conclusion that Appellant is incompetent at this time is based on his condition when he was examined in 1956 and the absence of evidence to establish that this condition no longer exists. Dr. Roche's testimony tended to support the conclusion that Appellant was not fit for sea duty although the doctor believed that Appellant was legally sane. The two are not necessarily contradictory.

The medical report was properly received in evidence despite counsel's objection on the ground of deprivation of the right to cross-examine. this report was admissible under 28 U. S. Code 1732 as an exception to the hearsay rule because it is a record made in the regular course of business. See Commandant's Appeal Decision No. 916 citing Medina v. Erickson (C.A. 9, 1955), 226 F. 2d 475, concerning the admissibility of hospital records of a patient.

### ORDER

The order of the Examiner dated at Philadelphia, Pennsylvania, on 17 august 1959, is AFFIRMED.

A. C. Richmond  
Vice Admiral, United States Coast Guard  
Commandant

Dated at Washington, D. C., this 19th day of April 1960.